DOCUMENT RESUME

ED 248 550 CS 504 677

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TITLE Argumentation and Debate and the Pre-Law Program: Some Considerations.
PUB DATE Sep 84
NOTE 17p.; Paper presented at the Convention of the Carolinas Speech Communication Association (Clemson, SC, September 28-29, 1984).
PUB TYPE Viewpoints (120) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Comparative Analysis; *Court Litigation; *Debate; Education Work Relationship; Higher Education; *Law Students; Models; *Persuasive Discourse; *Speech Communication; *Speech Instruction; Teacher Role
IDENTIFIERS *Prelaw Curriculum

ABSTRACT

Many students entering law school are surprised to find that the debating activities there (moot court, mock trial work, and trial advocacy courses) bear little resemblance to the debating they did at the undergraduate level. Those who teach, whether speech communication or prelaw, have an obligation to communicate to students the differences between the processes that occur in the courts of reason, such as academic debate, and those that take place in the courts of law. In both courts, evidential inputs normally begin the decision making process. However, the court of reason relies on authoritative testimony, the court of law on direct evidence. In a court of reason, much of the evidence is admitted unless the judge or judges permit it. Receivers in the courts of reason and law serve essentially similar functions. The differences lie in how the receivers come to be in their respective courts (self-selected or summoned) and in the degree of rigor involved in the evidential evaluation and decision making present in each court. In the court of reason, expectations for evaluation performance vary with the situation and circumstances. In the court of law, performance expectations of receivers are always high, and, unlike the court of reason, continuous efforts are made in order that these expectations can be met. The final difference to be considered lies in the nature of the judgment that the receivers render. The policy decisions produced in the court of law can have effects equal to, or greater than, those promulgated by the courts of reason. (HTH)

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Argumentation and Debate and the Pre-Law Program: Some Considerations

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Accepted for Presentation at the 1984 Convention of:

The Carolinas Speech Communication Association

Clemson, South Carolina, U.S.A.

September 28-29, 1984

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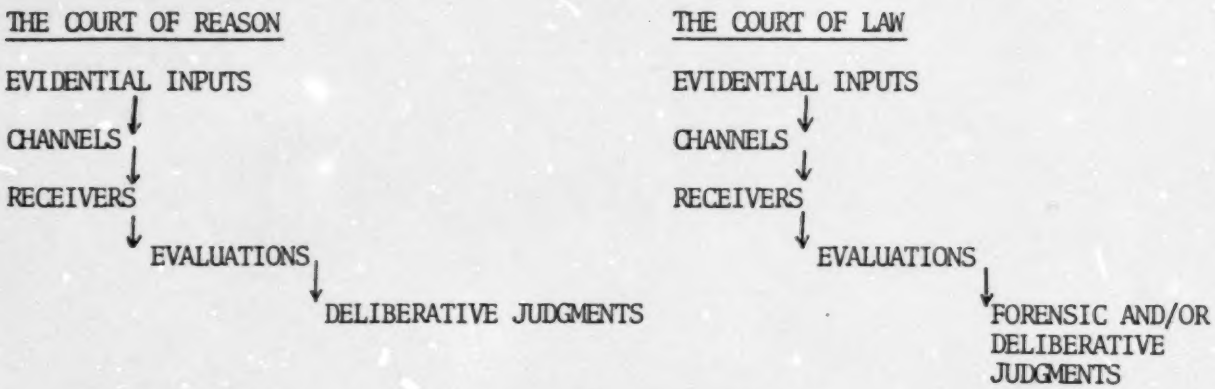
Publications within the fields of law and speech communication are replete with information, advice, and opinions extolling the virtues of speech communication courses in general, and experience in the area of argumentation and debate in specific, as excellent training for the potential attorney.[1] While I believe that most of this material is fundamentally sound, it is obvious that many students who attend law school are dissatisfied with their learning experiences. This is frequently true of one particular group of individuals -- intercollegiate debaters. Upon their arrival at law school they often find that the debating done there (moot court activities, mock trial work, trial advocacy courses, etc.) bears little resemblance, beyond some superficial similarities of form,[2] to the debating which they did at the undergraduate level. To some, this finding comes as a relief. To others, who attend law school because they like the challenge, clash, and competition of intercollegiate debate, and see law school as its logical continuation, it is a disappointment. To both groups, however, the finding is a surprise. The expectations which students have in regards to law school frequently differ from reality. This difference could be reduced if more undergraduate faculty advisers and teachers, especially those in disciplines such as speech communication which enroll large numbers of pre-law students, had a greater awareness of the difference between the processes which occur in the courts of reason, such as academic debate, and those which take place in the courts of law.

There are vast and fundamental differences between the processes which take place in the court of reason and the process which takes place in the court of law, and it is toward a consideration of these major differences that this essay is addressed. To better reveal these differences the following model can be postulated:



While the labels for the components of each model are almost idential, the functions of the components are often quite disparate. In order to more easily understand these differences each component of the model will be examined separately begining with the first, and perhaps most important, aspect of the process: evidence.

The intrinsic relationship of evidence to argumentation is axiomatic. It is indicated in that long standing dictum "he who asserts must prove" as well as in the literature.[3] It is a virtual given that evidence and the theories which govern the evaluation of evidence are some of the most important aspects of argumentation and debate.[4] For example, in that area of the court of reason known as academic debate, the participants are urged to gather evidence, to evaluate it, to organize it, to employ it, and, during the course of a debate, to argue about it. Normally, in an academic debate the participants present the evidence directly to the receivers (the judge(s)), the participants argue about the evidence through evidential attacks, and ultimately the judge(s) render a decision (hopefully in accordance with the evidential inputs). The procedure is different in the court of law. In both the courts of reason and law, evidential inputs normally begin the decision making process. However, the types of evidence employed vary: the court of reason relies, in the main, on authoritative testimony, the court of law -- direct evidence.

In the court of reason, we normally know what we know through authoritative testimony. When our automobile does not run well we take it to a mechanic. When the mechanic, after examination, says: "it looks to me like a blown head gasket and if it is, it'll cost you around $275.00 or so for me to fix it," few of us have the necessary expertise to verify or challenge his conclusion. Instead, most of us pretend that we understand him and that we know what he is talking about. As lay persons, we have essentially two choices: believe him and let him fix the car or disbelieve him and try to take the car elsewhere. Few of us have the time, money, or inclination to become mechanics in order to repair the vehicle ourselves. Similarly, when we are sick we consult a physician. We can either believe what our doctor tells us or see another doctor. Few of us are going to attend medical school in order to acquire the expertise needed to verify or challenge our physician's conclusions. Very few intercollegiate debaters know the throw weight of an MX, Minuteman, or Titan missile through first hand experience or direct evidence. Yet, during the 1980-1981 academic year many, if not most, intercollegiate debaters were well aware of that data.[5] They knew what they knew because someone told them--not because they crawled through missile silos counting and weighing warheads, calculating thrust capacity, and figuring throw weight. In short, they knew what they knew because of "authoritative" testimony. This is the way of the court of reason. We know most of what we know, not through first hand experience or direct evidence, but because someone has told us.

In contrast, the court of law relies heavily, if not primarily, on direct evidence.[6] To wit: the prosecutor brings in a gun and a body. The prosecutor supplies evidence, registrations and the like, to prove that this is Ralph's gun. The prosecutor supplies evidence which establishes that Ralph's fingerprints, and only Ralph's fingerprints, are on the gun. The prosecutor supplies

evidence which proves that Ralph's gun was the weapon used to kill Sam. The prosecutor supplies evidence which proves that the body is (a) dead and (b) Sam's. At this juncture, the state is well along the way toward establishing a prima facie case that Ralph killed Sam. The lynch pins in this case are direct evidence.

Not only is direct evidence emphasized in the court of law, but much of the "authoritative" testimony used in the court of reason would not be admitted into the court of law. It would be rendered inadmissible -- excluded as hearsay. Depending on the facts of the case, for instance, you cannot tell the court that your automobile has a blown head gasket (objection--conclusion), or that your mechanic told you that your car's engine has a blown head gasket (objection--hearsay). Under the proper circumstances, the mechanic could be brought into court, sworn in, and asked if he told you that the engine has a blown head gasket. However, depending once again on the fact situation, his statement would not necessarily be allowed to evidence the point that the car's engine has a blown head gasket -- only that he told you that it did. Evidential inputs, then, in the court of law are very different from those in the court of reason.

Compounding these differences are the channels through which the evidence is directed toward its receivers. In the court of reason, the evidence may be presented directly to the receivers or it may be mediated. Thus the channels are either unmediated (direct) or mediated. Much of the evidence we receive in the court of reason is mediated. We read the throw weight of an MX missile in Time magazine. We hear that Ralph was convicted of the slaying of Sam on the radio. We watch the local news on television and learn more concerning this conviction. However, much of the evidence we receive in the court of reason is, at least largely, unmediated. Our communications with our lawyers,

doctors, and automobile mechanics as well as with our butchers, teachers, bankers, pharmacists, and others of a similar nature are reasonably direct. Thus, the evidence which we receive from them in form of "authoritative" testimony is unmediated. Not so in the court of law. Here all of the evidence is mediated -- mediated by the court and through the court under the auspices of the court i.e., the judge(s).[7] No evidence is admissible into the court of law unless and until the judge(s) allow it to be admitted Judge(s) can and do exclude evidence for a variety of reasons.[8] Whereas in the court of reason the receivers are reasonably open to virtually all forms of evidential input, indeed the receivers are free to seek out evidence on their own, in the court of law the receivers are dependent upon the judge(s) for the evidence which they will receive. Furthermore, not only can judge(s) exclude evidence, they can, by such procedures as the taking of judicial notice,[9] include evidence and/or give greater probity to evidence which they may chose to admit. The judge(s) in the court of law then function as gate keepers, systematically admitting and excluding evidence from the consideration of the receivers.

Channel differences account for the major epistemological disparities in evidential theory in the courts of reason and law. In the court of reason, receivers are exposed to vast inputs of information. As consumers of rhetoric, they are frequently bombarded by evidence. The major factors which limit their evidential inputs can be viewed as being psychological in nature, for example, selective attention, selective perception, selective retention, and selective evaluation. Thus, in the court of reason, almost all evidence is admissible, therefore, the receiver must be capable of evaluating it. Unlike receivers in the court of law, receivers in the court of reason do not have the judge(s) to guide them. In the court of law, the judge(s), govern the admission of evidence, in the court of reason, it is the receivers who do so. Thus, evidential theory

in the court of law involves, in the main, issues of admissibility,[10] whereas evidential theory in the court of reason calls on the receivers to evaluate the evidence themselves and is not therefore fundamentally concerned with admissibility (as basically all evidence can, theoretically at least, be admitted into the court of reason) but rather with the ability and willingness of the evidence to tell the truth,[11] thereby mooting the issue of admissibility.

Receivers in the courts of reason and law serve essentially similar functions. Their role is to process and evaluate the evidence with a view toward decision making judgments.[12,13] Receivers in both arenas are thus engaged in what could be losely termed hypothesis formulation, testing, adoption, or rejection.[14] The differences are in how the receivers came to be in the courts and the degree of rigor involved in the evidential evaluation and decision making present in each court.

Receivers come into the court of reason on a self-selecting or ad hoc basis. Some, such as the intercollegiate debater, are there because they decide to be. Some, such as the professional policy analyst/decision maker, know where they are and what is expected to them. Others, such as Sam and Samantha Spacecadet, may only occassionally enter the court of reason and, upon arrival, have little knowlege of where they are or what their role is.

In contrast, receivers enter the court of law because they are summoned. Few individuals like to wile away the hours watching courtroom proceedings. Indeed, many of those called for jury duty try to get excused -- some successfully. Those who remain, however, are there because they were called, not because they volunteered. Whereas almost anyone can enter and participate in the court of reason, only those called and selected can enter and participate in the court of law. The selection process excuses many of the jurors who are called. Officers of the court will dismiss, either for cause or preemptorially,

jurors whom they think will render an unfavorable judgment. Thus, unlike the receivers in the court of reason who are self-selected or are selected on an ad hoc basis, the receivers in the court of law are examined, evaluated, and theoretically, at least, carefully selected.[15]

Just as the selection process which determines the receivers of each court varies, so to does the mental rigor with which each group of receivers is expected to perform.

In the court of reason, performance expectations vary as to the situations and circumstances. Normally, for example, more ability should be expected of a varsity debater on the first circuit than a novice debater on the third. Greater mental wherewithal regarding the on going Middle East crisis should be expected from a policy analyst/decision maker employed by the Rand Corporation than from an instructor in political science 101 at somewhere community college. More sophisticated consumer decision making should be expected of the researcher employed by Consumer's Union than by Harry and Harriet Homemaker. Not withstanding this varience, however, receivers in the court of reason are all engaged in essentially the same task: evidential evaluations involving hypothesis formulation, testing, adoption, or rejection, i.e. decision making. The differences among receivers in the court of reason lie not in their tasks but in the ability and willingness with which they perform their tasks.

In the court of law, performance expectations of receivers are high and, unlike the court of reason, continued on-going efforts are made in order that these high standards of expectations can be met. The receivers are carefully selected, a situation which is not always possible in the court of reason. Throughout the trial, the receivers are instructed by the judge, thereby supplying them with a known reference frame into which the evidence they are

receiving can be fitted. Before the jury retires to deliberate, they receive additional instructions from the judge designed to focus the evidence and clarify the issues which have been presented. During their deliberations, the jury can ask the judge for futher instructions or clarifications. Only after, and in light of, all of the above procedures does the jury make its judgment and render its verdict. Furthermore, there are instances where the court of law holds that the matters under consideration are too weighty, too complicated, too complex, even for jurors assembled under the best of the foregoing circumstances. In such situations, the court of law can chose to utilize a bench trial -- a situation which might best be described to the layperson as a sort of jury of judge(s).

The final difference to be considered lies in the nature of the judgment which the receivers of the courts of reason and law render. Typically, it is the role of receivers in the court of reason to evaluate the evidence and make a deliberative judgment.[16] They must decide on the efficacy of a future course of action; they render a policy decision. In contrast, receivers in the court of law may be called upon to make either a deliberative or forensic judgment. In the latter, of course, the jurors decide the guilt or innocence of the accused i.e. whether or not the defendant(s) committed a particular act or particular acts in the past. In the former, the court is frequently engaging in appellate advocacy and their decisions have the effect of producing policy;[17] relatively recent examples include: Brown v. Board of Education,[18] Mapp v. Ohio,[19] Baker v. Carr,[20] Gideon v. Wainwright,[21] Escobedo v. Illinois,[22] Katzenbach v. McClung,[23] Griswold v. Connecticut,[24] Miranda v. Arizona,[25] New York Times Co. v. U.S.,[26] Roe v. Wade,[27] Doe v. Bolton,[28] and U.S. v. Nixon.[29] The policy decisions thus produced can have effects equal to, or greater than, the policy decisions promulgated by the court of reason.[30]

This essay has sought to identify some of the major differences in the processes which occur within the courts of reason and law with a view toward explaining these differences. While this essay has not sought to argue the overall superiority of one arena over the other, I would agree with the observations of sociologist and philosopher C. Wright Mills:

> ...when there are values so firmly and consistently held by genuinely conflicting interests that the conflict can not be resolved by logical analysis and factual investigation, then the role of reason in that human affair seems at an end. ...In the end, if the end comes, we just have to beat those who disagree with us over the head; let us hope that the end comes seldom. In the meantime, being as reasonable as we are able to be, we ought all to argue.[31]

When arguing ceases and beating begins, the court of reason gives way to the court of law, a court which, in our litigious society, frequently becomes the ultimate arbiter. Those who wish to successfully make the transfer from the court of reason to the court of law, especially those with a background in the field of intercollegiate debate competition, need to recognize the fundamental differences between the processes which occur in both arenas. Those of us who teach such students, whether we do so under the rubric of speech communication or pre-law, have an obligation to be aware of these differences and to communicate them to our pupils.

FOOTNOTES

[1]For example, see: John F. Dobbyn, So You Want To Go To Law School (St. Paul, Minn.: West Publishing Company, 1976), pp. 52-55. Rennard Strickland, How to Get into Law School (New York: Hawthorn Books, 1974), pp. 68-77. Communication Careers (Annandale, Va.: Association for Communication Administration). Law Schools and Professional Education: Report and Recommendations of the Special Committee for a Study of Legal Educaiton of the American Bar Association (Chicago: American Bar Association Press), p. 116. Pre Law Hand Book (Washington, D.C.: Association of American Law Schools and the Law School Admission Council, 1982-1983).

[2]American intercollegiate academic debates are structured very similarly to legal debates. There are two sides, the affirmative, whose basic duty is to uphold or affirm the resolution being debated, and the negative, whose basic duty is to deny or negate the resolution being debated. Thus, at the outset of an academic debate, the burden of proof normally rests with the affirmative; presumption normally rests with the negative. In order to fulfill its burden of proof the affirmative team has to overturn presumption through the presentation of a prima facie case. The similarities between this structure and both civil and criminal litigation are obvious. Somewhat less obvious, especially to the lay person, are the similarities between academic debate and administrative law. Here too, however, the structure is highly analogous. For example, in discussing the case of Hall v. Harris Stan Allen writes: "A claimant for social security disability insurance benefits bears the burden of proving a disability. Once the claimant makes a prima facie showing of a physical impairment which effectively precludes him from returning to his past work, the burden of going forward shifts to the Secretary of Health and Human Services. From: Stan Allen, "Bench to Bar," Campbell Law Observer, (October 30, 1981), p. 12. For a more complete discussion of administrative law the reader is referred to: Bernard Schwartz, Administrative Law (Boston: Little, Brown and Company, 1976). For a general discussion of the comparison between academic debate and legal debate see: Patrick O. Marsh, "Is Debate Merely a Game for Conservative Players?" Speaker and Gavel, I, (January, 1964), 46-53.

[3]For example, see: Donald P. Cushman, T. J. Larkin, and Dennis Lefebvre, "Evidence, Argument, and Form" in Advanced Debate Readings in Theory, Practice and Teaching Ed. David A. Thomas (Skokie, IL.: National Textbook Company, 1979), pp. 215-219. Austin J. Freely, Argumentation and Debate (Belmont, CA.: Wadsworth Publishing Company, 1981), pp. 74-109. Maridell Fryar and David A. Thomas, Basic Debate (Skokie, IL.: National Textbook Company, 1981), pp. 22-34, 197, 200. J. Vernon Jensen, Argumentation Reasoning in Communication (New York: D. Van Nostrand Company, 1981), pp. 107-138. Gerald H. Sanders, "Toward More Effective Use of Evidence in Academic Debate" in Advanced Debate Readings in Theory, Practice and Teaching Ed. David A. Thomas (Skokie, IL.: National Textbook Company, 1979), pp. 227-238. James Edward Sayer, Argumentation and Debate Principles and Applications (Sherman Oaks, CA.: Alfred Publishing Company, 1980), pp. 95-96, 155-187. J. Michael Sproule, Argument Language and its Influence (New York: McGraw-Hill Book Company, 1980), pp. 30, 102-141, 387.

[4]Ibid.

[5]The National Debate Resolution for that year was, "Resolved: That the United States should significantly increase its foreign policy commitments."

[6]American Jurisprudence Second Edition (Rochester, New York: The Lawyers Co-operative Publishing Company and San Francisco: Bancroft-Whitney Company, 1967), Volume 29 pp. 37-38.

[7]For example, see: Michael W. Patrick, "Toward a Codification of the Law of Evidence in North Carolina," Wake Forest Law Review 16 (October, 1980), 669-709.

[8]For example, see: 1981 Edition Federal Rules Criminal Procedure Evidence Appellate Procedure (St. Paul, Minn.: West Publishing Company, 1981), p. 169. (Hereinafter referred to as Federal Rules). It states in part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." It is up to the judge(s) to do the excluding and to make the value judgments pertaining thereunto.

[9]For example, see: Federal Rules, pp. 161-162. Melinda Beck, "Footnote to the Holocaust," Newsweek (October 19, 1981), p. 73.

[10]The catalogs of law schools are especially revealing regarding this point. For example, in describing the course in legal evidence, the Bulletin of the Wake Forest University School of Law 1981-1982 states: "The rules and standards by which the admission of proof at trial is regulated." (p. 35). Similarly, the University of San Diego School of Law 1981-1983 Bulletin reads: "This course is concerned with the rules which limit the facts, opinions, and things that may be used in proof, and also, with the rules which govern how they may be evidenced." (p. 40). The University of Notre Dame Law School Bulletin of 1982-1983 states that the evidence course: "Studies the legal principles governing the admissibility of controversial facts in judicial proceedings . . ." (p. 18). The 1981-82 Catalog of Vermont Law School informs the reader that: "The course will consider the rules governing the admissibility of testimonial, physical, documentary, and demonstrative evidence in trials and other formal legal proceedings." (p. 29). The Western New England College School of Law Bulletin 1982-1983 describes the legal evidence course as: "An introduction to the basic rules of the exclusionary system of evidence which govern the proof of disputed propositions of fact in criminal and civil trials." (p. 60).

[11]For a case study which applies the historigraphical criteria of the ability and willingness of a witness to tell the truth to some of the major sources of evidence used in the court of reason see: Robert P. Newman, "The Weekly Fiction Magazines," The Central States Speech Journal XVII (May, 1966), pp. 118-124.

[12]For example, see: Tim Lee, Dave Harris, and Craig Dudczak, "Empirical Studies and Their Use in Debate" in Advanced Debate Readings in Theory, Practice and Teaching Ed. David A. Thomas (Skokie, IL.: National Textbook Company, 1979)

pp. 251-271. Allan J. Lichtman, Daniel M. Roher, and Joseph Mizner, "The Role of Empirical Evidence in Debate: A Systems Approach" in Advanced Debate Readings in Theory, Practice and Teaching Ed. David A. Thomas (Skokie, IL.: National Textbook Company, 1979) pp. 272-286. Robert P. Newman and Dale R. Newman, Evidence (New York: Houghton Mifflin and Company, 1969).

[13]For example, see: Patrick, 669-709. American Jurisprudence Second Edition (Rochester, New York: The Lawyers Co-operative Publishing Company and San Francisco: Bancroft-Whitney Company, 1967), Volume 29. Federal Rules pp. 155-238.

[14]For an analysis of the process of hypothesis treatment as it applies to academic debate specifically see: Lee, Harris, and Dudczak, pp. 251-271.

[15]One particular aspect of the court of reason merits the special attention of a footnote--the judge(s) at debate tournaments. Tournament practices vary, at some the judge(s) are carefully screened. In some instances judging selection falls into the middle of the above continuum. For additional information see: Peggy H. Gibson and L. Dean Fadely, "Debate Judging: A Perspective," Debate Issues 11 (December, 1976), 5-7. John T. Morello, "Intercollegiate Debate: Proposals for A Struggling Activity," Speaker and Gavel 17 (Winter, 1980), 103-107.

[16]Obviously, there are situations, such as those encountered in C. E. D. A. debating, or in some forms of artistic criticism, in which the receivers are called upon to render value judgments. Normally, however, such value judgments are made as a prelude to policy decisions. For example, the decision that the right to privacy is the most fundamental of American rights carries with it certain inescapable policy considerations. On another level, even the most mundane evaluative conclusion such as, that is a beautiful neck-tie, indicate a propensity to engage in a policy decision, to wit: to purchase the neck-tie.

[17]For an analysis of a criminal trial in which the jurors were called upon to render both deliberative and forensic judgments, see: Vivian I. Dicks, "Courtroom Rhetorical Strategies: Forensic and Deliberative Perspectives," The Quarterly Journal of Speech 67 (May, 1981), 178-192. The article examines the Angela David trial in which Ms. Davis was charged with kidnapping, murder, and conspiracy.

[18]347 U.S. 493 (1954) and 349 U.S. 294 (1955)

[19]367 U.S. 643 (1961)

[20]369 U.S. 186 (1962)

[21]372 U.S. 335 (1963)

[22]378 U.S. 478 (1964)

[23]379 U.S. 294 (1964)

[24]381 U.S. 479 (1965)

[25]384 U.S. 436 (1966)

[26]403 U.S. 713 (1971) (per curiam)

[27]410 U.S. 113 (1973)

[28]410 U.S. 179 (1973)

[29]418 U.S. 683, 692 (1974)

[30]For a readable, if popularized, analysis of the policy role in appellate litigation see: Bob Woodward and Scott Armstrong, The Brethren (New York: Avon Books, 1979). For a more scholarly treatment, see: Richard Neely, How Courts Govern America (New Haven: Yale University Press, 1981). Harold J. Spaeth, "Computer 9, Supreme Court 0," Barrister 9 (Spring, 1982), 8-11, 37.

[31]C. Wright Mills, The Sociological Imagination (New York: Oxford University Press, 1959), p. 77.